ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Televisions Systems	)	MM Docket No. 87-268
and Their Impact Upon the	)	
Existing Television Broadcast Service	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF

MEDIA ACCESS PROJECT, BENTON FOUNDATION, CENTER FOR MEDIA EDUCATION, CONSUMER FEDERATION OF AMERICA, MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, AND THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS

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SUMMARY

MAP, *et al.* support the basic thrust of the Commission's digital television initiative. This petition takes issue not with what the Commission has done, but with what it has ***failed*** to do. The Commission has improperly failed to follow its statutory mandate by declining to adopt new public interest obligations for digital television that are commensurate with the expanded capacity provided by the technology. It has also departed from requirements of the Communications Act by failing to require potential digital television licensees to demonstrate their fiscal fitness to build and operate a digital television facility.

In granting extra free spectrum to broadcasters without requiring new public interest obligations, the Commission violates the core principle upon which the American system of broadcasting is built. This doctrine has its roots in the Radio Act of 1927 and is cemented firmly into Supreme Court jurisprudence: ***when the government gives free spectrum to broadcasters, they must, in turn, compensate the public with service.*** Indeed, Congress reaffirmed this principle not once, but ***three times*** in the Telecommunications Act of 1996.

The Commission's decision doubles broadcasters' spectrum allotments for an indeterminate period. It also permits broadcasters to develop multiple profit-enhancing, free and pay digital services while they continue uninterrupted analog TV service. This latter opportunity, alone, justifies the adoption of new, innovative public service obligations that are commensurate with the expanded capacity digital transmission provides.

The principle of "spectrum for service" was also violated when the Commission granted extra free spectrum to broadcasters that have rejected their role as public trustees. The most egregious abdication of this role came in a speech by NAB President Eddie Fritts. Just days after

the government gave broadcasters free spectrum and "must carry," he urged his members to "get government out of our business." If broadcasters refuse to abide by their public trustee responsibilities, they cannot receive a gift of new spectrum.

The Commission also erred when it failed to require broadcasters to demonstrate that they are financially capable of building and operating a digital television facility. While the Commission views the conversion to digital as a mere "change" in facilities, it is much more than that - a broadcaster must obtain a new construction permit, and a new license. Because the digital license will be new, the Commission must determine whether an applicant is qualified to receive it. The 1996 Act does not prohibit that result. The plain language of the statute makes all current licensees ***initially*** eligible to apply for a license. But it does not speak to what entities are ***qualified*** to receive that license.

Finally, the Commission should clarify that all new and existing public interest requirements will apply to both free and subscription program services in both the analog and digital television modes. The plain language of Section 336 of the 1996 Act requires this result. It mandates that "the television licensee shall establish that ***all*** of its program services on the existing or advanced television spectrum are in the public interest." "All" program services clearly includes both free and pay program services.

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PETITION FOR RECONSIDERATION AND CLARIFICATION

Media Access Project, the Benton Foundation, the Center for Media Education, Consumer Federation of America, the Minority Media and Telecommunications Council, and the National Federation of Community Broadcasters ("MAP, *et al.*"), respectfully submit this Petition for Reconsideration of the Commission's *Fifth Report and Order*, FCC No. 97-116, 62 Fed. Reg. 26,966 (May 16, 1997).[1] In the *FR&O*, the Commission adopted rules governing, *inter alia*, the terms and conditions under which incumbent television broadcasters will receive free extra spectrum to convert to digital television ("DTV").

In this Petition, MAP, *et al.* seek reversal of the Commission's failure to 1) adopt new public interest obligations for digital television at the present time, and 2) require broadcasters to demonstrate that they are financially qualified to receive this new spectrum. In addition, MAP, *et al.* asks the Commission to clarify that, under 47 USC §336(d), both analog and digital subscription services are subject to Title III public interest obligations.

INTRODUCTION

MAP, *et al.* wish to make plain their support for the basic thrust of the Commission's digital television initiative. This petition takes issue not with what the Commission has done,

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[1]This petition is timely filed pursuant to 47 CFR §1.429(d) and 47 CFR §1.4(b)(3).

but with what it has ***not*** done - it challenges two significant omissions from an otherwise excellent decision. With that qualification, MAP, *et al.* applaud the Commission's largely successful effort to promote the interests of the American public as the digital era becomes reality. The Commission's decision has

- provided for a rapid rollout of digital television;
- chosen to let the public decide if it wants high definition television (HDTV); and
- set a firm and reasonable date for the return of broadcasters current "analog" channel.

There are, as noted, two necessary changes for the FCC to fulfill its statutory duty to award digital television licenses in the public interest, convenience and necessity. 47 USC §§336(a)(2),(b) and (d). As discussed below, the most flagrant of these shortcomings is the Commission's failure to adopt (or at the very least to commit to adopt in the near future) new public interest obligations for digital television that are commensurate with the expanded capacity provided by the technology. By failing to do so, the Commission has violated the very principle underlying America's entire system of universal, free, over-the-air broadcasting, *i.e.*, that grant of free spectrum requires a dividend of public service in return. It is not enough, as the Commission has done here, to simply apply current public interest obligations to this new service. Digital technology will provide enormous opportunities for broadcasters. The public should benefit from this technology as well.

Nor did the Commission serve the public interest when it failed to require current licensees to demonstrate that they have the financial capability to build and operate a DTV facility. As will be surely seen from petitions for reconsideration to the *Sixth Report and Order*, FCC No. 97-115, 62 Fed. Reg. 26,684 (May 14, 1997), the Commission will be unable to grant DTV

licenses to many financially qualified broadcasters because of spectrum scarcity. If the Commission were to grant DTV licenses to financially unqualified, and even bankrupt, licensees, not only would qualified broadcasters be left out, but there would be no guarantee that unqualified licensees would ever build or operate a digital facility.

I. THE COMMISSION ERRED IN GRANTING EXTRA FREE SPECTRUM TO BROADCASTERS WITHOUT REQUIRING INCREASED PUBLIC INTEREST OBLIGATIONS.

In considering the scope of broadcasters' public interest obligations for the digital age, the Commission properly notes that these obligations originate "in the statutory mandate that broadcasters serve the 'public interest, convenience and necessity,' as well as other provisions of the Communications Act." *FR&O* at ¶45. It also acknowledges that Congress, in the Telecommunications Act of 1996 ("1996 Act"), provided that these obligations "extend into the digital environment." *Id.* at ¶48. Furthermore, the Commission recognizes that current public interest requirements "were developed when technology permitted broadcasters to provide just one stream of programming over a 6 MHz channel," and that "[t]he dynamic and flexible nature of digital technology creates the possibility of new and creative ways for broadcasters to serve the country and the public interest." *Id.* at ¶49. Even so, the Commission ruled that, for the time being at least, it would only apply current public interest obligations to digital broadcasters. *Id.* at ¶50.

But the Commission erred in failing to recognize that its public interest mandate requires it to modify broadcasters' public interest duties to make them commensurate with the expanded capacity that comes with digital technology. It also failed to ensure that the public shares the dividend derived from publicly owned spectrum. Instead of so ruling, the Commission promised

"at an appropriate time...[to] issue a Notice to collect and consider all views****Broadcasters and the public are also on notice that the Commission ***may*** adopt new public interest rules for digital television." *Id.* [Emphasis added].

The Commission's failure to adopt new public interest obligations for digital television at the same time it gave free spectrum to broadcasters (or, at the very least, to ***commit*** to adopt such obligations in the near future) violates the very principle which underlies our system of broadcasting, *i.e.* when the government gives free spectrum to broadcasters, they must, in turn, compensate the public with service. Congress reaffirmed this principle thrice in the 1996 Act. *See* discussion at pp. 7-9. Here, the Commission is giving broadcasters an extra allocation of spectrum, which will enable them to offer many different profit-enhancing services. Such an allocation demands enhanced public service obligations.

A. Broadcasters Have Always Been Required to Provide Public Service in Exchange for Allocation of Broadcast Spectrum.

The principle that the public must be recompensed for the exclusive use of public spectrum is as old as the Radio Act of 1927.[2] In the 1927 Act, Congress adopted the licensing

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[2]This theory was embraced by then-Secretary of Commerce Hoover prior to the 1927 Act. Between 1921 and 1925, radio had mushroomed from a handful to almost 600 stations, and competition for limited spectrum capacity had caused interference problems. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 211 (1943). Hoover, who had previously been charged with licensing broadcasters to use electromagnetic frequencies, quickly realized that a method was needed for apportioning this scarce resource. In the keynote address to the first National Radio Conference in 1922, he stated his conviction that, because broadcasting used "a great national asset," *i.e.* the spectrum, it was "of primary public interest to say who is to do the broadcasting, under what circumstances, ***and with what type of material.***" Herbert Hoover, *Speech to the First National Radio Conference*, February 27, 1922, Document No. 209 Hoover Collection, Stanford University, *quoted in* Krattenmaker, *Telecommunications Law and Policy* 11 (1994) [emphasis added]. *See also* Herbert Hoover, *Opening Address to the Fourth National Radio Conference, reprinted in* Radio Control, Hearings Before the Senate Interstate Commerce Committee, 69th Cong., 1st Sess. 56 (1926) ("The use of a radio channel is justified

method of spectrum allocation. But it rejected an alternative method to distribute broadcast spectrum, wherein broadcasters would maintain property rights in the spectrum. For example, the Senate Committee on Interstate Commerce heard descriptions of the sale and resale of licenses and the private bargaining that went on between licensees assigned to the same frequency. Radio Control, Hearings Before the Senate Interstate Commerce Committee, 69th Cong., 1st Sess. 56 (1926).

This view did not prevail: the "central feature" of what ultimately became the 1927 Act was that Congress "deliberate[ly]" chose to "preclude private ownership of spectrum rights while licensing these rights for brief periods to private users free of charge." Krattenmaker *Telecommunications Law and Policy* 11 (1994). *See* Radio Act §9, 44 Stat. 1162 (1927) (repealed 1934) ("1927 Radio Act"). The Act's sponsor, Senator Dill, stated contemporaneously that, "the one principle regarding radio that must always be adhered to, as basic and fundamental, is that government must always retain complete and absolute control of the right to use the air." Clarence Dill, *A Traffic Cop for the Air*, 75 Review of Reviews 181, 184 (1927), *cited in* Krattenmaker at 11.

The power to parcel out spectrum, free of charge, among competing applicants came hand-in-hand with government ownership of spectrum. This required adoption of criteria for choosing among would-be licensees. For this, Congress adopted the "public interest, convenience, and necessity" standard. 1927 Radio Act at §9. As House sponsor Wallace White noted in floor debate:

[T]here must be a limitation upon the number of broadcasting stations and...licenses

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only if there is public benefit.")

> should be issued only to those stations whose operations would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art....If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.

67 Cong. Rec. 5479 (1926).

Broadcasters clearly understood from the outset that the receipt of spectrum licenses was conditioned with explicit, inseparable public interest obligations. They "did not dissent" to this *quid pro quo*; "they embraced it." Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, *in* A Legislative History of the Communications Act of 1934 (Max Paglin ed., 1989) 3, 11.[3] Indeed, the National Association of Broadcasters passed a resolution at the fourth National Radio Conference declaring that "the test of the broadcasting privilege [must] be based upon the needs of the public served by the proposed station." Resolution of NAB presented at the fourth National Radio Conference, *reprinted in* Radio Control, Hearings Before the Senate Interstate Commerce Committee, 69th Cong., 1st Sess. 59 (1926).

It is widely recognized that the 1934 Communications Act ("1934 Act") adopted its predecessor's conception of the public interest in broadcasting. This included the critical element which defines the duty which comes which comes with exclusivity, *i.e.*, spectrum scarcity. Because spectrum is scarce, its use is conditioned upon licensee adherence to public in-

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[3]Scholars have offered differing views of broadcasters' motives in accepting the public interest mantle. No one, however, has argued that altruism was among them. One opinion is that the broadcast industry accurately assumed that regulation would inevitably favor incumbents' interests over those of the marginal stations and potential entrants. Krattenmaker at 12. Another is that the system was not incompatible with commercial profit and, significantly, did not subject broadcasters to public-utility type regulation. Robinson at 13. Whatever its reasons, the broadcast industry knowingly and willingly accepted, and even encouraged, this arrangement.

terest requirements. H.R. Conf. Rep. No. 1918, 73rd Cong., 2nd Sess. at 48 (1934).

As the Supreme Court has observed,

> The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio." The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest....Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity."

National Broadcasting Company v. United States, 319 U.S. at 216-17 [citations omitted] (1943). Over the years, the Court has repeatedly reaffirmed this notion. *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2457 (1994) ("the inherent physical limitation on the number of speakers who may use the broadcast medium...permit[s] the Government...to impose certain affirmative obligations on broadcast licensees."); *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984) ("We have long recognized that Congress...has power to regulate the use of this scarce and valuable national resource. The distinctive feature of Congress' efforts in this area has been to ensure through the regulatory oversight of the FCC that only those who satisfy the 'public interest, convenience and necessity' are granted a license...."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 392, 389 (1969) ("[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favors of others whose views should be expressed on this unique medium").

B. Congress Mandated that the Commission License Digital Broadcasters in the Public Interest, Convenience and Necessity in the Telecommunications Act of 1996.

The Commission's decision to refrain, even temporarily, from adopting new public interest requirements commensurate with the new opportunities provided by digital transmission runs contrary to the plain language of Section 201 of the Communications Act. Indeed, Congress re-

quired that the Commission require public service for new digital services not once, but ***three times***, in Section 201 of the Telecommunications Act of 1996, 47 USC §336. 47 USC §336(d) states that

> Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience and necessity. In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, ***the television licensee shall establish that all of its program services on the existing or advanced television spectrum are in the public interest.***

[Emphasis added.]

Similarly, 47 USC §336(a)(1) requires the Commission, if it awards licenses for digital television, *inter alia*, to

> adopt regulations that allow the holders of such licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience and necessity.

Finally, 47 USC §336(b)(5) provides that in prescribing the regulations required under subsection (a), the Commission may

> prescribe such other regulations as may be necessary for the protection of the public interest, convenience and necessity.

By this triple mandate, Congress sought to ensure that the Commission required public interest obligations for new digital services. The plain language of these provisions specifically extended this mandate to digital program services, 47 USC §336(d), and to ancillary and supplementary services. 47 USC §§336(a)(1) & (b)(5). It would have been unnecessary for Congress to adopt these provisions had Congress merely intended the Commission to extend current public interest obligations to digital television. As the Commission itself notes, that obligation is already contained "in the statutory mandate that broadcasters serve the 'public interest, conveni-

ence and necessity,' as well as other provisions of the Communications Act." *FR&O* at ¶45. *See* Sutherland on Statutory Construction (1994) at §46.06 ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant").

C. The Commission Must Adopt New Public Interest Obligations Commensurate With New Digital Technologies Because Broadcasters are Receiving Extra New Spectrum That Will Enable Them to Offer New and Different Services.

As discussed above, the assumption underlying our entire system of broadcasting is that spectrum is allocated for the free and exclusive use of broadcasters conditioned upon the promise of public service. Incumbent broadcasters have thus far had the free and exclusive use of 6 MHz of spectrum. The Commission has now doubled their entitlement. This is alone should be enough to trigger new public interest obligations.

Moreover, this extra spectrum will permit broadcasters to offer a myriad of new, profit enhancing services that they cannot now offer over their current channel. ABC-TV Network News President Preston Padden has called DTV "nothing less than an opportunity to...permanently and materially enhance the value of our broadcast assets." "ABC Offers to Subsidize Some of Cost of Affiliates' DTV Transition," *Communications Daily*, June 4, 1997 at 4. It follows logically that new, enhanced public interest obligations should attach, and that those obligations should reflect that new digital technologies will facilitate innovative public service.

The enormity of the opportunities presented by the gift of spectrum cannot be overstated. Broadcasters will have full use of 12 MHz of spectrum for a minimum of nine years, a time per-

iod which broadcasters are already seeking to have lengthened.[4] Even if the "original" channel ultimately reverts to the public, the grant of new spectrum will permit broadcasters access to "double dip" for an extended period of time.

Most importantly, grant of the extra spectrum will enable broadcasters to offer multiple program, nonprogram and subscription services that they have never before been able to provide. These services include, but are not limited to, pay-per-view video services, data transfer, Internet service, paging, telephony and high definition television, all of which will greatly enhance broadcasters' bottom line. In the absence of the second channel, broadcasters could not make the conversion to digital while at the same time, continuing to profit from their analog TV service. The mere fact that broadcasters will have the opportunity to provide uninterrupted analog TV services while developing new digital services justifies the adoption of new, innovative public interest obligations.

II. THE COMMISSION ERRED IN GRANTING FREE EXTRA SPECTRUM TO BROADCASTERS WHO HAVE REJECTED THEIR PUBLIC TRUSTEE DUTIES.

In the *FR&O*, the Commission gives broadcasters free digital television licenses based,

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[4]There are several recent instances in which the broadcast industry has attempted to extend the "giveback" period indefinitely. For example, on April 17, 1997, NAB President & CEO Eddie Fritts sent a letter to the Chairman of the Senate Budget Committee asking that he oppose the inclusion of "any...budget proposal that uses accelerated spectrum auction revenue from broadcasters." April 17, 1997 Letter from Eddie Fritts to the Honorable Pete V. Domenici. In addition, the industry has so far successfully added a provision to the Fiscal Year 1998 Budget Reconciliation Bill that would require the FCC to give extensions for the return of spectrum to broadcasters in communities where "more than 5 percent of households in such market continue to rely exclusively on over-the-air terrestrial analog television signals." Bryan Gruley, "TV Broadcasters Gain Ground in Effort to Delay Return of Licenses for Auction," *Wall Street Journal*, June 13, 1997 at B5. Since there is likely to always be at least 5% of the population that will not make the change to digital television unless they are forced to, broadcasters would be able to seek unlimited extensions.

in part, on the idea that broadcasters are currently public trustees and will continue in that role in the digital age. *FR&O* at ¶¶1, 44. But recent actions by the industry's trade association and the major networks demonstrate that broadcasters have reneged on their part of this compact with the public by rejecting their trustee mantle. Having done so, the Commission should now reverse its decision to give broadcasters free spectrum for digital television.

Over the past several months, the broadcast industry has, on at least several occasions, publicly renounced their public trustee duties. Perhaps the most egregious of these was a speech given by National Association of Broadcasters' President and CEO Edward O. Fritts, just four days after the Commission adopted its decision to give broadcasters the free extra channel. There, Mr. Fritts praised the FCC's action and the Supreme Court's recent decision in *Turner Broadcasting System v. FCC*, No. 95-992 (March 31, 1997), which upheld the Congressional requirement that cable operators provide free carriage for local broadcast stations. Far from acknowledging the link between broadcasters special public interest mandate and this governmentally granted largesse, Mr. Fritts gleefully celebrated these privileges as if they were birthrights. And, instead of redoubling his industry's indebtedness to Congress and the Commission, he brazenly urged his members to "keep the government out of our business." Remarks by Edward O. Fritts, President/CEO National Association of Broadcasters At the NAB'97 Opening Session, Monday, April 7, 1997. Mr. Fritts then bit the hand that had just fed his members with tens of billions of dollars of free spectrum. He lambasted the FCC's role in requiring public service, and insisted that "broadcasters commitment to public interest programming should not be measured by Big Brother." *Id.*

In a second recent public repudiation of the public trustee scheme, the NAB, ABC, CBS

and NBC recently filed an *amicus curiae* brief in the Supreme Court that asserted, *inter alia*, that the scarcity rationale underlying the public trustee scheme is no longer sound, and that cases such as *Red Lion*, which affirm that scheme, are suspect. *See generally*, Brief *Amici Curiae* of the National Association of Broadcasters; ABC, Inc.; CBS, Inc.; and National Broadcasting Company, Inc. In Support of Appellees, *Reno v. ACLU*, No. 96-511 (U.S.). Although the case in which the brief was filed concerned restrictions on speech over the Internet and did not address the rights of broadcasters, the industry *amici* asked the Court to "avoid any reassertion" of the public trustee scheme because it is "of such dubious continuing validity." Brief at 12.

These and other similar actions in recent months demonstrate that broadcasters no longer believe that it is in their best interest to abide by the pact that has served as the sole justification for their receipt of free spectrum.[5] It follows that if they refuse to abide by their public trustee responsibilities, they cannot receive a gift of new spectrum from the FCC.

III. THE COMMISSION ERRED IN FAILING TO CONSIDER THE FINANCIAL QUALIFICATIONS OF LICENSEES PRIOR TO GRANTING DTV LICENSES.

In the *FR&O*, the Commission determined that applications for DTV construction permits and licenses are "minor" changes in facilities, and therefore declines to require broadcasters to provide any showing that they are financially qualified to make the conversion to digital transmission. *FR&O* at ¶74. Although the Commission previously feared that financially unqualified applicants could ***slow*** the transition to digital by tying "up spectrum without ever obtaining the funds necessary to build the facility," *id.* at n. 160, the Commission arbitrarily decides that

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[5]Symptomatic of these was a speech made by CBS Chairman Michael Jordan on June 18, 1996. Mr. Jordan argued that broadcasting the Summer Olympics and "providing relaxing family entertainment to somebody who has had a hard day at work should count" toward a broadcaster's public interest obligations.

ignoring financial qualifications will now "***speed*** the process." *Id.* at ¶74. [Emphases added.]

The Commission's decision not to require broadcasters to demonstrate that they are financially capable of building and operating a digital television facility is wrong both as a matter of law and policy. The conversion to digital television involves more than a mere "change." As the Commission sets out in the *FR&O*, the conversion to digital will require broadcasters to obtain a new construction permit, and a new license. *E.g.*, *FR&O* at ¶¶74-75 (requiring broadcasters to file an application for a construction permit and an application for a license to cover the construction permit). Because the digital license will be new, the Commission must determine, *inter alia*, whether a particular applicant is qualified to receive it. That the Commission calls this process a "change" does not make it so.[6]

Moreover, contrary to what the Commission asserts, barring financially unqualified licensees from obtaining DTV licenses does not in any way run afoul of the statutory requirement that the Commission

> should limit the initial eligibility for such licenses to persons that,...are licensed to operate a television broadcast station or hold a permit to construct such a station....

47 USC §336(a)(1). *See FR&O* at n. 160.

Congress did not mandate the result the Commission has followed. The plain language

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[6]In any event, the Commission's analysis that the DTV licensing scheme is not a "major" change is indefensible. A major change is one that results in a change in frequency or community of license. 47 CFR §73.3572 (a)(1). But the Commission says that "the change involved in constructing and operating a DTV facility does not constitute a change in frequency, merely the implementation of the initial DTV License on a channel assigned in the *Sixth Report and Order*." *FR&O* at n. 159. This is regulatory doubletalk. The channel that broadcasters will be assigned for the conversion to digital will be on a different frequency than the one which they currently operate. Whether broadcasters use this new frequency for their current analog or future digital transmissions, they will certainly "change" their frequency.

of the statute merely sets forth the universe of entities that are, in the first instance, eligible to ***apply*** for DTV licenses, *i.e.*, incumbent licensees. However, the statute does not at all speak to which of those eligible entities are ***qualified*** to receive those licenses. Congress' use of the word "initial" is critical in this regard - it refers to a first stage of a process. If Congress intended to require that all incumbent licensees to receive DTV licenses, it would have used language to that effect, *e.g.*, "the Commission must grant licenses to persons..." or "persons that are licensed to operate a television broadcast station or hold a construction permit shall receive such licenses." But the plain language of the statute does not provide such a mandate. Nothing in the statute supersedes the requirement that the Commission determine, as it must with all applicants for a license, an applicant's "citizenship, character, and financial, technical, and other qualifications." 47 USC §308.

The outcome is bad policy as well. Failure to require broadcasters to demonstrate their financial qualifications will mean that free spectrum could be given to financially unqualified, and in some cases, to ***bankrupt*** licensees who may never build or operate the station.[7] This will likely result in the very delay the Commission seeks to avoid. The Commission's action will also encourage parties who do not plan ever to build or operate the station to "warehouse" spectrum for the sole purpose of selling it when its market value rises. Permitting such unjust enrichment would run contrary to decades of Commission precedent, and would be arbitrary and capricious. *See, e.g.*, *Advanced Communications Corp.* 11 FCCRcd 3399 (1995), *affirmed sub nom.*, 84 F.3d 1452 (1996), *cert. denied*; *Directsat Corp.*, 10 FCC Rcd 88 (1995).

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[7]MAP, *et al.* has already said that it has no objection to licensees in reorganization, but still operating, being eligible for DTV licenses. MAP, *et al.* Reply Comments at 11 n.15.

IV. THE COMMISSION SHOULD CLARIFY THAT SUBSCRIPTION PROGRAM SERVICES ARE SUBJECT TO PUBLIC INTEREST OBLIGATIONS.

The Commission should clarify that all new and existing public interest requirements will apply to free and subscription program services in both analog and digital television modes. That is what the Commission appears to have held. However, its language is sufficiently vague as to leave doubt as to the ruling. The Commission appears to adopt that position implicitly. It recognizes MAP, *et al.'s* argument that "public interest obligations should apply to each program service, including ***subscription*** services, provided over DTV spectrum, *FR&O* at ¶47 [emphasis added], and also quotes §336(d) of the 1996 Act, with its mandate that "the television licensee shall establish that ***all*** of its program services on the existing or advanced television spectrum are in the public interest." *Id.* at ¶48. [Emphasis added]. However, the Commission does not squarely address the issue MAP, *et al.* raised, *i.e.*, whether public interest obligations should apply to subscription program services. Instead, the Commission states that "Congress clearly provided that broadcasters have public interest obligations on the program services they offer, regardless of whether they are offered using analog or digital technology." *Id.*

The Commission should now expressly rule that all subscription television services, be they analog or digital, are subject to public interest obligations. The plain language of Section 336 demands no less. As the Commission notes, Congress mandated that a TV broadcaster demonstrate that "***all*** of its program services on the existing or advanced television spectrum are in the public interest." 47 USC §336(d) [Emphasis added]. "All" program services clearly includes both free and pay program services.

By requiring public interest obligations to attach to both subscription and free broadcast services regardless of the transmission technology, Congress has overruled the Commission's

decision in *Subscription Video*, 2 FCC Rcd 1001 (1987) *aff'd sub nom. National Association for Better Broadcasting v. FCC*, 849 F. 2d 665 (D.C. Cir 665). There, the Commission ruled that because subscription services are not intended to be received by the "general public," they were not "broadcast" services, and therefore not subject to Title III public interest obligations. *See* MAP, *et al.* Comments at 26. As MAP, *et al.* discussed in its comments at pp. 26-27, *Subscription Video* was wrongly decided. Even though Congress has acted, the Commission still has the statutory and regulatory authority to overrule *Subscription Video* expressly. It should take this opportunity to do so and eliminate any confusion that might arise if the decision is left untouched.

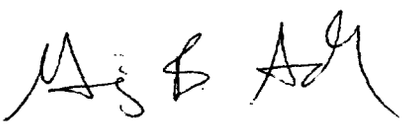
CONCLUSION

The Commission has made a good start in building the regulatory infrastructure by which broadcasters will commence digital operations. Unfortunately, it has left out the most important building block - a requirement that broadcasters furnish public service commensurate with the opportunities digital technologies will provide. Anything less than a total commitment to new public service obligations violates the foundation upon which this nation's broadcasting system was built.

For the foregoing reasons, the Commission should 1) reverse its decision not to adopt new public interest obligations for broadcasters commensurate with the opportunities provided by digital technology; 2) reverse its decision not to require broadcasters to demonstrate that they are financially qualified to receive a digital television license; and 3) clarify that public interest obligations apply both to free and subscription television services, whether they are transmitted

through analog or digital modes.

Respectfully submitted,



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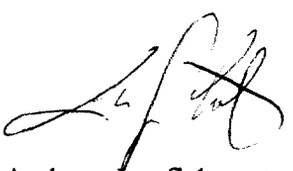

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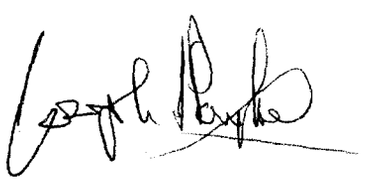

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